No. 22,405

IN THE

United States Court of Appeals

For the Ninth Circuit

LLOYD E. HILDEBRAND,
Appellant,

vs.

GREAT AMERICAN INSURANCE CO.,
Appellee.

Appeal from the Judgment of the United States District Court for the Eastern District of California

Honorable Oliver J. Carter, United States District Judge

APPELLEE'S BRIEF

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STATEMENT OF PLEADINGS

I. Jurisdiction of Court.

Appellant has appealed from the judgment of the United States District Court for the Northern District of California, Northern Division[1] awarding judgment to Great American Insurance Company in an action

[1]This action was commenced on June 7, 1961, in the Northern Division of the United States District Court for the Northern District of California, situated in Sacramento, California. (Tr. 1) The matter came on to be heard on August 15, 1966, before the Honorable Oliver J. Carter, normally assigned to the Southern Division of said District situated in San Francisco. Subsequent to said hearing, but prior to the filing of Judgment, the United States District Court in Sacramento was redesignated as the United States District Court for the Eastern District of California. Since that date all papers have been filed in the Eastern District of California although the Memorandum for Judgment and Judgment are captioned in the Northern District of California.

in indemnity. (Clerk's Transcript 185, 220, hereinafter referred to as "Tr.")

Jurisdiction of the cause below was predicated on diversity of citizenship between plaintiff and defendant and an amount in controversy in excess of $10,000.00, as provided in the provisions of Sections 1332 and 1391, Title 28, U.S.C.

The pleadings show that Appellee is a corporation organized and existing according to the laws of the State of New York, with its principal place of business in New York City and authorized to do, and doing business, within the State of California. (Tr. 1) Appellant is a citizen and resident of the State of California. (Tr. 1) The amount in controversy, exclusive of interest and costs, is in excess of $10,000.00. (Tr. 5)

II. Pleadings.

The pleadings consist of a complaint filed by Appellee (Tr. 1-13), answer filed by Appellant (Tr. 15-17), and an Agreed Statement of Facts (Tr. 121-132).

A. Complaint.

The complaint alleged that prior to September 7, 1957, Appellant, Great American Insurance Company (hereinafter referred to as "Great American") issued to Erickson Bros., a corporation (hereinafter referred to as "Erickson"), its comprehensive multiple liability policy, Form SF 51721, Number LX 46553, and that said policy was in full force and effect on September 7, 1957. (Tr. 2)

It was alleged that Erickson and Emmanuel Schwab (hereinafter referred to as "Schwab") were the owners of a warehouse building located at 921 Front Street, Sacramento, California. Prior to October 1, 1956, Erickson and Schwab leased this warehouse building to H. C. Evans (hereinafter referred to as "Evans") on a month-to-month basis with the understanding that Evans was to be responsible for the inspection, maintenance and use of the elevator located within the building. (Tr. 2-3)

It was alleged that Evans employed Appellant to place said elevator in a working condition and thereafter entered into an agreement with Appellant for the continued maintenance of said elevator. From the date that Evans assumed occupancy of the building, the elevator was operated, controlled and maintained by Evans and Appellant. The complaint alleged that on September 7, 1957, Kasper Hardmeyer (hereinafter referred to as "Hardmeyer"), an employee of Evans, was killed while using said elevator, and in a subsequent action brought by the estate of Hardmeyer against Erickson, Schwab and Appellant, the complaint alleged that the death of Hardmeyer was due to carelessness and negligence in the operation, control and maintenance of said elevator. The action filed by the Hardmeyer estate was brought to trial and judgment on a verdict in the amount of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00), plus costs, was entered against all defendants. (Tr. 3-4, 6)

It was alleged that Great American paid to the estate of Hardmeyer an amount of Forty Thousand Dollars ($40,000.00) in return for a release of its insured—Erickson and Schwab—of any and all liability. Erickson and Schwab have assigned all of their rights, claims, demands and interests to Appellee. (Tr. 4)

Appellee claimed in its complaint that it had a right to be indemnified by Appellant for the Forty Thousand Dollars ($40,000.00) paid to the estate of Kasper Hardmeyer, inasmuch as his death was due to the negligence of Appellant and that liability was imposed upon Appellee's insured only because of their nondelegable duties as the owner of the premises. In addition, it was alleged that any negligence of Appellee's insured was passive and secondary. (Tr. 4-5)

B. Answer.

Appellant filed an answer in which he admitted the execution of an agreement with Evans to conduct semi-monthly examinations and inspections of said elevator and that he was employed by Evans to place the elevator in working condition. (Tr. 6)

C. Proceedings Below.

This action came on for trial on August 15, 1966. Prior to that time, counsel entered into an Agreed Statement of Facts. (Tr. 121) This statement provided as follows:

> "The following facts are agreed and stipulated between counsel for plaintiff, Great American Insurance Company, a corporation, and counsel for

defendant, L. E. Hildebrand dba Valley Elevator Company:

1. Plaintiff Great American is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York City, New York, and is authorized to transact insurance business in the State of California.

2. Defendant, L. E. Hildebrand dba Valley Elevator Company (hereinafter Valley Elevator) is a citizen and resident of the State of California.

3. The amount in controversy is in excess of $10,000.00.

4. Erickson Brothers, a corporation and Emmanuel Schwaub [sic] were the owners at all times herein mentioned of a warehouse building located at 921 Front Street, Sacramento, California.

5. Prior to October 1, 1956, and during the entire time herein mentioned, H. C. Evans dba Evans Van and Storage Company leased from Erickson Brothers and Schwaub [sic] the entire premises located at 921 Front Street, Sacramento, California.

6. Said lease was on a month to month basis and during the entire period of time herein mentioned Evans Van and Storage had the sole right of possession to these premises.

7. Located in the building at 921 Front Street, was a freight elevator which was used by Evans Van and Storage in the furtherance of its warehouse business. The use of this elevator was with the express understanding that Evans Van and

Storage was to be responsible for the use, maintenance and inspection of said elevator.

8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit 'A' to this stipulation and incorporated herein.

9. On September 7, 1957, at a time when Evans Van and Storage was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from this freight elevator and eventually died as a result of said injuries.

10. A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer, seeking to recover for his death against Erickson Brothers, Emmanuel Schwaub [sic] and Lloyd E. Hildebrand, individually, and dba Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator.

11. On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of $112,500.00 plus $918.03 costs.

12. The liability of Erickson Brothers and Emmanuel Schwaub [sic] the owners of the premises was predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them.

13. The liability of Valley Elevator was predicated on a finding of negligence in the performance of their contract with Evans Van and Stor-

age and such negligence was a proximate cause of the death of Kasper Hardmeyer.

14. Prior to September 7, 1957, plaintiff Great American issued to Erickson Brothers a comprehensive multiple liability policy, Form SF 51721 (Pacific Coast), Number LX 46553, which policy was in effect on September 7, 1957.

15. In September, 1960, plaintiff Great American paid forty thousand dollars ($40,000.00) to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Brothers and Schwaub [sic].

16. Thereafter plaintiff, Great American, took an assignment from Erickson Brothers and Schwaub [sic], wherein plaintiff was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the 'Assignment and Subrogation Receipt' is attached hereto as Exhibit 'B' and incorporated herein.

17. The present action was filed seeking indemnification against Evans Van and Storage and Valley Elevator for the forty thousand dollars ($40,000.00) paid by Great American in partial satisfaction of judgment, plus interest, costs of defense and attorney fees incurred in the wrongful death action.

18. On June 14, 1965, plaintiff executed a release of its claims against Evans Van and Storage. Coincidentally with this release, plaintiff and Evans entered into an 'Assignment and Covenant Not to Execute'. In the latter, Great American agreed not to look to any personal assets of Evans in satisfaction of said settlement

in return for an assignment by Evans of any rights which he might have against any insurance company insuring Evans against liability arising out of the death of Kasper Hardmeyer. Copies of these agreements are attached hereto as Exhibits 'C' and 'D'.

19. To this date plaintiff, Great American, has received no payment under the terms of this release and assignment." (Tr. 121-124)

SUMMARY OF ARGUMENT

California law, which controls the disposition of the diversity action, specifically allows implied indemnification either on contractual or equitable grounds. Both contractual and equitable consideration justified the trial Court's holding that Appellee was entitled to indemnification.

The Agreed Statement of Facts showed that Appellant agreed to place the elevator in working condition and to inspect and service the elevator. The benefit conferred on Appellee under this Agreement was a sufficient contractual relationship to justify the application of implied indemnity when the negligent performance by Appellant of the Agreement was a proximate cause of the death of Hardmeyer.

The Agreed Statement of Facts demonstrated that Appellee was entitled to implied indemnification on equitable grounds. The facts showed that "in equity and good conscience" the burden of liability should be shifted from Appellee to Appellant. Appellee had been out of possession for almost one year; Appellee had

leased the premises with the understanding it was not to be responsible for the use or maintenance of the elevator; Appellant had agreed with the lessee to place the elevator in working condition and inspect and service the elevator on a semi-monthly basis; the death of Hardmeyer was proximately caused by Appellant's negligence, and Appellee's liability was predicated solely on its nondelegable duty as the owner of the property.

The release and dismissal of Evans is not a bar to this action. Section 877 does not apply to an action for indemnification. Additionally, the Agreed Statement of Facts shows that Appellee received no compensation for this release; thus, there has been no double recovery.

ARGUMENT

I

CALIFORNIA LAW CONTROLS THIS ACTION AND IT SPECIFICALLY RECOGNIZES THE RIGHT TO INDEMNIFICATION ON EITHER EQUITABLE OR CONTRACTUAL GROUNDS.

A. Introduction.

The central question raised by the pleadings and papers on file in the trial Court was stated by that Court to be as follows:

> "The central question which is before this Court is whether the plaintiff, Great American, as assignee and subrogee of its insureds, is entitled to indemnification from defendant Valley for the amount it had paid on the judgment to the heirs of Kasper Hardmeyer, the deceased, in the absence of an agreement between these par-

> ties providing for a right of indemnification. Specifically we are concerned with the problem of whether indemnity should be implied from the particular factual context of this case which admits of no explicit contractual relationship between plaintiff's insureds and the defendant." (Tr. 175)

After extensive briefing and lengthy oral argument, the trial Court answered this question in the affirmative and awarded judgment to Appellee. In awarding judgment, the trial Court held that Appellee was entitled to indemnification on both equitable and contractual grounds, although either ground alone would be sufficient to sustain a judgment for Appellee. (Tr. 173-183)

Appellant, in this appeal, does not quarrel with the question posed by the trial Court; rather, he asserts that this question was answered incorrectly, arguing that Appellee was not entitled to recover on either equitable or contractual grounds. We respectfully submit that the judgment of the trial Court was correct and should be affirmed on appeal.

B. California Law Is Controlling.

The jurisdiction of the trial Court was founded on diversity of citizenship and amount in controversy. Section 1332, Title 28, U.S.C. Accordingly, it is clear that the trial Court was required to follow the substantive law which a California state trial Court would follow. *Erie R. Co. v. Thompkins* (1938), 304 U.S. 64, 82 L. Ed. 1188. It is equally clear and requires no citation, that in this case, where all the relevant contracts

relate to California, a California trial Court would apply the California law in determining Appellee's right to indemnity.

C. California Allows Indemnification Based on Either Equitable or Contractual Grounds.

The law is well settled in California that one tort-feasor may seek and obtain indemnification from another tort-feasor provided there is either a contractual or equitable basis for such recovery. Section 875(f), Cal. Code Civil Procedure. *Cahill Brothers, Inc. v. Clementina Co.* (1962), 208 C.A. 2d 367; *De La Forest v. Yandle* (1959), 171 C.A. 2d 59; *Alisal Sanitary Dist. v. Kennedy* (1960), 180 C.A. 2d 69; *City and County of San Francisco v. Ho Sing* (1958), 51 C. 2d 127; *Lewis Avenue Parent Teachers Assn. v. Hussey* (1967), 250 C.A. 2d 232; *Cobb v. Southern Pac. Co.* (1967), 251 C.A. 2d 929.

Thus, we submit that the only issue raised by this appeal is whether or not, based on the undisputed facts in this case, Appellee had a right to indemnification under either a contractual or equitable theory. If Appellee is entitled to indemnification on either theory, the judgment must be affirmed.

II

THE TRIAL COURT WAS CORRECT IN HOLDING THAT APPELLEE WAS ENTITLED TO INDEMNIFICATION BASED ON A CONTRACTUAL RELATIONSHIP WHERE APPELLEE WAS A BENEFICIARY UNDER APPELLANT'S CONTRACT WITH EVANS.

The Agreed Statement of Facts demonstrated the existence of two separate, but distinctly related, contractual relationships. First, in leasing the premises to Evans, Appellee's insured expressly provided that Evans would be responsible for the use, maintenance and inspection of the elevator. Second, Evans in fulfilling its responsibility under the lease, contracted with appellant to place the elevator in working condition[2] and to inspect and service the elevator on a semi-monthly basis.

Under the principles enunciated in a number of California cases, it would appear to be clear that a right to implied indemnification would exist in favor of either Appellee's insured or Evans for any damage suffered by the breach of their respective contracts. See *Cahill Brothers, Inc. v. Clementina Co.* (1962), 208 C.A. 2d 367; *City and County of San Francisco v. Ho Sing, supra.* In *Cahill* the Court held:

> "It is apparent from the foregoing cases, therefore, that the right of implied indemnity in contractual cases is based upon a breach of contract

[2]Appellant, throughout his entire brief ignores this aspect of the agreement and argues only that the inspection and service contract imposed no duty to correct defects. Regardless of the validity of this argument, it would seem clear that his agreement to place the elevator in "working condition" at the outset required him to correct any defects which may have existed at the time Evans took possession of the premises.

> by the person against whom indemnity is sought, while in the area of noncontractual indemnity the right rests upon the fault of another which has been imputed to or constructively fastened upon him who seeks indemnity." (208 C.A. 2d 367, 379-380)

Thus, to the extent Appellee's insured was required to pay because of Evans' failure to properly use, maintain and inspect the elevator, they would have the right to indemnification based on Evans' breach of its agreement. Similarly, to the extent Evans was required to pay because of Appellant's failure to place the elevator in working condition and to properly service and inspect it, Evans would have a right to indemnification based on Appellant's breach of its agreement.[3]

Appellant, while apparently not disputing the above, argues that, inasmuch as there was no direct contractual relationship between himself and Appellee's insured, no contractual basis for indemnification existed. This same argument was made to the trial Court and rejected. The trial Court recognized the nonexistence of any direct contractual relationship, but found the contractual basis for implied indemnity in a third-party beneficiary analysis. Specifically, the Court held:

> "In this case this requirement is satisfactorily met by recognizing that the plaintiff's insureds

[3]There can be no dispute that Appellant breached his agreement and that the negligent performance of his agreement with Evans was a proximate cause of Hardmeyer's death. See Paragraph numbered 13, Agreed Statement of Fact. (Tr. 123) Also, the agreement contained a clause imposing liability on Appellant for all injuries or damages directly due to his act or omission. (Tr. 126)

> are third party beneficiaries of the contract between Valley and Evans and that the implied warranties which would necessarily run to Evans enure to the benefit of the owners of the warehouse as well." (Tr. 178)

We respectfully submit that the trial Court was correct in holding that this established a sufficient contractual basis for indemnification.

California specifically recognizes the existence of contracts made for the benefit of third persons and provides for the enforceability of such contracts by the third party. Section 1559, Civil Code; *Karpe v. United States* (Ct. of Claims 1964), 335 F. 2d 454; *cert. den.* 379 U.S. 964, 13 L. Ed. 2d 558. And such contracts need not specifically name the third-party beneficiary in order to allow that party to enforce them. *Spector v. National Pictures Corp.* (1962), 201 C.A. 2d 217.

However, this Court need not reach the question as to whether or not Appellee's insured could have enforced the underlying contract. The only issue is whether or not this contract, which was entered into to fulfill the agreement between Evans and Appellee's insured, provided a sufficient contractual relationship to justify indemnification.

The Supreme Court of the United States has held that the conferring of contractual benefits is a sufficient relationship to allow indemnification. *Crumady v. J. H. Fisser* (1959), 358 U.S. 423, 3 L. Ed. 413. In *Crumady v. J. H. Fisser, supra,* the Court allowed the vessel to recover indemnification from the stevedoring

company even though there had been no direct contractual relationship between the vessel's owners and the stevedoring company. In so doing the Court stated:

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts §133." (358 U.S. 428, 3 L. Ed. 2d 417)

Similarly, in this case the agreement of appellant to place the elevator in working condition and to periodically examine and service the elevator benefits the building owners and brings them within "the zone of modern law that recognizes rights in third-party beneficiaries."

Although there are no California cases specifically in point, we submit that California would follow the holding in *Crumady, supra.* First, California has adopted with approval the reasoning in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* (1956), 350 U.S. 124, 100 L. Ed. 133, and *Weyerhaeuser S.S. Co. v. Nacirema Co.* (1958), 355 U.S. 563, 2 L. Ed. 2d 491, and the holding in *Ryan* was the basis, in part, for the Supreme Court's decision in *Crumady.* Second, the history of implied indemnity in California has been one of expansion and not of contraction. Compare the language in *Alisal Sanitary District, supra,* with the language in *Lewis Avenue Parent Teachers Assn. v. Hussey, supra.* Thus, the California cases

would indicate that the California courts would determine this issue in exactly the same way as it was determined by the trial Court.

Appellant, recognizing the legal validity of the trial Court's opinion, attacks this aspect of the judgment, not on the basis that California courts would not apply implied indemnification to third-party beneficiary situations; rather, he asserts that the trial Court had no factual basis for its determination. Specifically, he quarrels with the following:

> "If the owners are to be held liable as a matter of law for the safe operation of this elevator, and it was Valley's contractual duty to maintain the elevator in a safe condition, then the owners were third party beneficiaries of Valley's services." (Tr. 178)

Appellant argues that this holding is inaccurate in two respects: One, there was no such duty on the owners and, second, it misconstrues the agreement between Evans and Appellant. Both arguments are untenable and seek to ignore the clear language of the Agreed Statement of Facts. We will deal with each separately.

A. Appellee's Insured Liability.

Appellee's insured, as owners out of possession, were held liable by the jury for the death of Hardmeyer. And this liability was predicated on their nondelegable duties as owners (Paragraph 12, Agreed Statement of Facts).

Appellant agreed that this was the basis of Appellee's insured liability. Having agreed to this fact, he

should not now be heard to argue that there were no such "non-delegable" duties and that the trial Court was in error in relying on this agreed fact.

In his brief, Appellant suggests that the basis for the owners' liability was their failure to warn Evans at the time of leasing of a defect in the elevator. Assuming *arguendo,* the accuracy of this suggestion, we fail to see how it aids Appellant's attack on the judgment. Appellee's insured, by their agreement with Evans, and Evans, by its agreement with Appellant, sought to protect themselves against any liability arising out of the use, maintenance and control of the elevator, including liability arising from a defect in the elevator at the time the premises were leased. As against a third party user of the elevator, this attempted transfer of liability would be unavailing, but it clearly provides sufficient contractual basis for implied indemnity.

B. Appellant's Agreement With Evans.

Appellant's attack on the interpretation placed on its agreement with Evans similarly seeks to avoid the clear language of the Agreed Statement of Facts. Paragraph 8 provided as follows:

> "8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit 'A' to this stipulation and incorporated herein." (Tr. 122)

As has been noted previously Appellant conveniently fails to mention in this brief anything concerning his

duty to place the elevator in "working condition". At the very least, this imposed a duty on him to correct any defects which might have existed in the elevator at the time when Evans took possession of the building and to put the elevator into a safe working condition.

In addition, Appellant signed an "Inspection Service Contract" which required Appellant to examine and service the elevator on a semi-monthly basis. This contract was attached to the Agreed Statement of Fact. (Tr. 125-126) Appellant asserts that this contract did not impose any duty on it to maintain this elevator in a safe condition. We submit that Appellant's assertion in this regard is absurd. The intent of this Agreement is clear—to examine and service. Reasonable men could only assume that such examinations were to be made for the purpose of ascertaining the existence or non-existence of defects or potential defects. Whether or not Appellant then had to make the necessary repairs revealed by the examinations is irrelevant; he clearly had an obligation to advise Evans of the necessity of such repairs.

Thus, we respectfully submit that the holding of the trial Court as to Appellee's right to implied indemnity on a contractual basis, was based solely on the clear language of the Agreed Statement of Facts, and it is Appellant who now seeks to avoid this language.

III

THE TRIAL COURT WAS CORRECT IN HOLDING THAT APPELLEE WAS ENTITLED TO INDEMNIFICATION ON EQUITABLE GROUNDS.

In its argument to the trial Court, Appellant sought to defeat Appellee's right to indemnification by asserting that such right only existed where there was a special relationship between the parties and that no such relationship existed in this case. Appellant, of necessity, has now had to abandon this argument because of the recent holding in *Lewis Avenue Parent Teachers Assn. v. Hussey* (1967), 150 C.A.2d 232.[4] In that case the Court held:

> "The right of indemnity may rest upon any of several alternative grounds including an express or implied contract to indemnify, the difference between primary and secondary liability of two persons (as in one case, where a principal's liability flows from the acts of his agent), the existence of a special relationship between the parties, or other facts indicative, that in equity and good conscience the burden of the judgment should be shifted." (pp. 235-236).

A special relationship is only one of the various justifications for the application of implied, noncontractual indemnity.

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[4]Equally broad in its language is the holding in *City of Sausalito v. Ryan* (1968 ..... C.A.2d ....., 258 A.C.A. 92, which adopted with approval the opinion in *United Air Lines, Inc. v. Wiener* (1964) 335 F.2d 379. However, the Supreme Court of California has granted a hearing in *City of Sausalito v. Ryan*, Minutes, 68 Adv.Cal. No. 11, page 2. Thus, the decision has become "a nullity and . . . of no force or effect . . . as an authoritative statement of any principle of law therein discussed. *Knouse v. Nimocks* (1937) 8 C.2d 482, 483-484.

The keystone in the California courts' approach to implied indemnity is summed up in the above-quoted phrase "facts indicating that in equity and good conscience the burden of the judgment should be shifted." *Lewis Avenue Parent Teachers Assn. v. Hussey, supra,* p. 236. Such an approach must, of necessity, be applied on a case-by-case basis and must be based on a balancing of the equities involved.

We submit that the trial Court's judgment shifting the burden was clearly in accord with "equity and good conscience" and was based solely on the Agreed Statement of Facts.

The Agreed Statement of Facts showed that Hardmeyer was killed while using the elevator and that his death was due to negligence in the use, maintenance and control of the elevator (Paragraph No. 9). (Tr. 122) It showed that Appellee's insured had been out of possession of the premises for almost one year and that their liability for the Hardmeyer death was predicated "solely on their non-delegable duties . . . and was not predicated on any affirmative acts taken by them." (Tr. 122-123)

On the other hand, Appellant's liability was predicated "on a finding of negligence in the performance of their contract . . . and such negligence was a proximate cause of the death of Kasper Hardmeyer." (Tr. 123) In addition, the contract which was attached as Exhibit A to the Agreed Statement of Facts provided:

> "It is agreed that we [Appellant] assume no liability for injuries or damage to persons or property except those directly due to our acts or

> omissions; and that your responsibility for injuries or damage to persons or property while on or about the elevators referred to is in no way affected by this agreement. We shall not be liable for any loss, damage, or delay caused by strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion, war, malicious mischief, act of God, or by any cause beyond our reasonable control, and in any event we shall not be liable for consequential damages." (Tr. 126)

These facts more than amply satisfy the "equity and good conscience" test for shifting the burden of judgment.

A review of a few California cases demonstrates the propriety of implied indemnification in this case. In *Alisal Sanitary District v. Kennedy* (1960) 180 C.A. 2d 69, the Court adopted the following language:

> " 'The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence—a doctrine which, indeed, is not recognized by the common law; . . . It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured

> person . . .' (Citing examples.) And on pages 327 and 328 the court went on to say: 'Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.' " (180 C.A. 2d 75.)

In *Herrero v. Atkinson* (1964) 227 C.A. 2d 69, the plaintiff's wife had been struck by an automobile driven by Herrero. Eighteen months later she died while undergoing treatment for these injuries; death allegedly resulted from negligent medical care. Suit was brought against Herrero and the medical personnel and Herrero cross-complained for indemnity against the said personnel. A Demurrer to this Cross-Complaint was sustained on the grounds that there was no right to indemnification. In reversing the trial Court, the Appellate Court, while recognizing that a contract or a special relationship can give rise to a claim for indemnity went on to find that there was a further basis for indemnity,

> ". . . where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The

> right depends upon the principle that everyone is responsible for the consequence of his own wrongs, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." (227 C.A. 2d 74)

See also *City and County of San Francisco v. Ho Sing* (1958) 51 C. 2d 127; *Cahill Bros., Inc. v. Clementina Co., supra; Cobb v. Southern Pac. Co.* (1967), 251 C.A. 2d 929.

In a case closely analogous to the case at bar, *Otis Elevator Co. v. Maryland Casualty Co.* (1934) 95 Colo. 99, 33 P. 2d 974 (cited with approval in *San Francisco Unified School District, supra),* the Colorado Court held that the building owner was entitled to indemnification against the defendant who had been employed to inspect and repair the building's elevator. The Court held that although the building owner owed a duty to the public to maintain a reasonably safe elevator, the owner had a right to recover from the elevator company because its negligence was the "primary cause" of the accident. In Prosser, *Law of Torts* (3rd Ed. 1964) Section 48, at page 280, it is stated:

> "Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where . . . an owner of land held liable for injury received upon it sued the wrongdoer who created the hazard."

This is exactly the situation in this case.

Appellant's attempt to show that the trial Court's determination concerning Appellee's right to indem-

nification on equitable grounds was based on speculation and facts outside the Agreed Statement is unfounded. The trial Court's Memorandum for Judgment demonstrated beyond peradventure that it was based solely upon the Agreed Statement and conclusions to be drawn therefrom. It is Appellant who seeks to avoid the clear language of the Agreed Statement of Facts.

IV

THE RELEASE AND DISMISSAL OF EVANS DOES NOT BAR RECOVERY BY GREAT AMERICAN (Tr. 183).

Appellant attacks the determination of the trial Court that the release and dismissal of Evans is not a bar to this action. In so doing, Appellant cites no case law, but relies solely on the provisions of Section 877, Title 11, California Code of Civil Procedure. This reliance is not well founded. First, Title 11, of which Section 877 is a part, is not applicable to an action for indemnification. Second, even assuming its applicability, the release does not preclude recovery by Appellee in this action. We will deal with each *seriatim*.

A. Title 11 Is Not Applicable to Indemnity Actions.

Title 11, California Code of Civil Procedure is captioned "Releases From and Contribution Among Joint Tort-Feasors," and was enacted to abrogate the common law rules applied in California concerning the right of contribution between joint tort-feasors and effect of the release of one or more joint tort-feasors.

Augustus v. Bean (1961) 56 C.2d 270; cf. *Steele v. Hash* (1963) 212 C.A.2d 1. It was specifically not meant to change any rights of indemnity which existed at the time of its enactment. Section 875(f), Title 11, California Code of Civil Procedure provides:

> "(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

Further, a reading of Section 877 itself clearly indicates its inapplicability to an action for indemnification. It clearly demonstrates that it is addressed to releases given by one suing on the tort itself, and not to one seeking indemnification. Thus, defendant's reliance on Section 877 is inapposite. The case at bar is an action for indemnity and releases pertaining to an indemnity action are controlled by other principles of law.

The right to indemnity is founded upon principles of implied in law contracts. *City and County of San Francisco v. Ho Sing* (1958) 51 C.2d 127; Notes 32 So.Calif.L.Rev. 293-299. See *Pacific Employers Ins. Co. v. Hartford* (9th Cir. 1955) 228 F.2d 365, *cert. denied* 252 U.S. 826, 1 L.Ed.2d 49, which held that Section 339, California Code of Civil Procedure, or the two year statute of limitations dealing with contractual liabilities, rather than the one year tort statute, governs an action by an insurer, as subrogee of an employer, to enforce implied indemnity against defendant insurer which insured the negligent em-

ployee primarily responsible. In that case the Court held:

> "[This was] an action for the enforcement of a right based upon an implied contract . . . and a two-year statute of limitations would be applicable. Thus, either Neil or Pacific could have brought an action against employees prior to January 27, 1953."
>
> See also Restatement, Restitution Sec. 96.

Under the implied in law contract of indemnity, both Evans and Appellant became joint and several debtors to plaintiff's insured, Erickson, and, by principles of subrogation, to Appellee, when it partially discharged a judgment which was the ultimate responsibility of Appellant and Evans.

Regardless of whether the implied in law contract obligations of Appellant and Evans to Erickson to indemnify him are considered joint and several, the California law is clear that a release as to one does not in any way discharge the liability of the other, except to the extent of payment. The controlling California law on the effect of the release of one or more joint contractual debtors is found in Section 1543, Civil Code, which provides as follows:

> "A release of one or two or more joint debtors does not extinguish the obligation of any of the others . . ."

This Section has uniformly been held to mean that the portion of the debt which remains unpaid after the release is still the liability of the non-released debtor. *Lovetro v. Steers* (1965) 234 C.A.2d 461, 477; *French*

v. McCarthy (1899) 125 Cal. 508. As was stated by the Court in *Loretro v. Steers, supra,*

> "(A) release of the one joint debtor does not extinguish the obligation of any of the other joint debtors to pay *so much of the debt as was not paid by the released obligor.* In other words, the release does not extinguish the *remainder of the obligation* as to the co-obligors." (234 C.A.2d 477).

See also:

Bank of America v. Duer, 47 C.A.2d 100 (1941).

So also, where there are several, as compared to joint, obligations arising out of contract, a release of one does not operate to release another severally liable under that contract. See *In re Sanderson,* 74 Cal. 199 (1887).

B. Assuming Arguendo That Section 877 Is Applicable, It Does Not Preclude Recovery.

1. The Evans Release Does Not Stipulate That Appellee's Claim Against Appellant Should Be Reduced in Any Amount.

Section 877, California Code of Civil Procedure reads, in pertinent part, as follows:

> "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tort feasors claimed to be liable for the same tort—
>
> (a) It shall not discharge any other such tort feasor from liability unless its terms so provide but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the

consideration paid for it whichever is the greater . . ."

There can be no dispute that the release, marked as Exhibit "C", by its terms intends to release no one other than Evans. Further, there can be no dispute that Appellee has received no payment for the release. Hence, Appellant's entire argument is premised on the asserted applicability of the language "reduce the claims against the others in the amount stipulated by the release." But a review of the Evans release shows it contains no stipulation as to the amount by which Appellee's claim should be reduced as to others including Appellant. On the contrary, the release expressly states that the claim against others is not to be reduced, through the language: "This release does not release any person or party except as named herein." The amount of $40,000 is recited to be the consideration which Appellee is entitled to receive from Evans. This is a far different thing from a stipulation by the parties to the release that Appellee's claim against others is to be automatically reduced in such amount.

The word "stipulation" is synonymous with the word "agreement". (See Webster's Second Unabridged Dictionary.) A mere recital by a releasor of consideration intended to be received for a release (note that the release does not even recite that the consideration has been received) is not an "agreement" between the parties to the release that the releasor's claims against others shall be automatically reduced in a fixed amount on execution of the release and regardless of subsequent payment.

The statute obviously was designed to permit a *tort* claimant with a claim of an unliquidated amount to *agree* with one of several tort-feasors obligated for the tort that his release should operate as a partial discharge of the overall liability for a fixed amount, which might be requested by the released party where the consideration given might be less. For example, this may occur in a case of disputed liability where the released party may request and obtain express agreement that he should be free to a fixed extent from potential claims of indemnity of another, in return for a small consideration. It should not be interpreted as *requiring* extinguishment of the tort claim to the extent of consideration recited which has not been paid or acknowledged received, and where the parties to the release have not stipulated to a fixed reduction of the claim against others. Such a construction would fly in the teeth of all judicial construction as to the effect of a release of a joint obligor, holding in substance that the obligation is extinguished to the extent of payment received on the consideration, unless the parties evidence a contrary intent. It would also render the provision in the release that the release should not release a third party meaningless.

See for instance *Lovetro v. Steers,* 234 C.A.2d 461 (1965); *Bank of America v. Duer,* 47 C.A.2d 102 (1941).

2. Under Common Law, a Release of a Joint Tort-Feasor Constitutes No Bar to Action Against the Other, Where No Compensation Has Been Paid.

It is stipulated in the agreement statement of facts that Appellee has received no payment under the release, so the entire debt is still remaining and Appellant's obligation has not been reduced by one penny.

Even when dealing with releases in tort actions, the cases hold that such releases do not bar recovery against one who was jointly liable where no payment has been made. Typical of the holding in these cases is the following language in *Shea v. City of San Bernardino,* 7 Cal.2d 288 (1944):

> "The discontinuance as to one tort-feasor, of an action brought against several tort-feasors, no satisfaction having been received, does not release the others." (7 C. 2d 694)

Or, even more pertinent is the following language in *Commercial Transfer v. Daigh & Stewart,* 33 C.A. 2d 370 (1939):

> "It is the fact of compensation for the wrong complained of that operates as a release of the remaining joint tort-feasors, not the mere discontinuance as to one of them without satisfaction having been given . . ." (33 C.A. 2d 373)

See also Cf. *Oil Tool Exchange v. Schuh* (1944), 67 C.A. 2d 288, 153 P. 2d 976; *Key v. Caldwell* (1940), 39 C.A. 2d 698, 104 P. 2d 87; *Savia v. Moorehead* (1948), 83 C.A. 2d 147, 188 P. 2d 260. Similarly, in the case at bar, Appellee has received no compensation for

the release and, based on the above authority, it is free to pursue its action against Appellant.

3. No Justification Is Presented to Support the Construction of Section 877 Now Urged by Appellant; It Would Simply Produce an Unintended Windfall, and Interfere With the Right of Parties to Settle Their Differences Amicably Before Trial.

The only justification advanced by Appellant for his argument that Section 877 precludes recovery is the threat of possible double recovery for Appellee and double liability against Appellant. This justification will not stand the test of analysis.

Appellee's claim in indemnity against either Evans or Appellant must be reduced by the actual payment received from either. Cf. *Lovetro v. Steers* (1965), 234 C.A. 2d 461, 477; *French v. McCarthy* (1899), 125 Cal. 508; *Laurenzi v. Vranigan* (1945), 25 C. 2d 806, 155 P. 2d 633; *Magee v. Wyeth Laboratories* (1963), 214 C.A. 2d 340, 358-359. To the extent that Appellee recovers payment on a judgment against Appellant, it cannot recover on its release from Evans under the common law rule that payment from one joint or several debtors works a pro tanto release of the other. Thus, the threat which Appellant poses is nonexistent and there is no justification in law or in equity to deny recovery to Appellee because of its release of Evans.

The law should be construed in a manner which fosters the amicable settlement of disputes before judgment. It would result in extreme hardship if a party to litigation were prevented from settling his case against one defendant desiring settlement for fear

that consideration recited, but may not be collectible, would to that extent discharge the liability of another. The case at bar should be treated in the same manner as if Erickson had obtained a judgment against both Appellant and Evans, in which case their joint liability to Erickson would only be discharged to the extent of payment of such judgment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the trial Court should be affirmed.

Dated, San Francisco, California,
May 24, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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